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IN THE SUPREME COURT OF THE UNITED STATES

1987-88 TERM

JOHN E. BRITAIN,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA NO. 85-399

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION NEW TRIAL WITHOUT AN EVIDENTIARY HEARING AND AN OPPORTUNITY TO PRESENT EVIDENCE OF OUTSIDE INFLUENCES UPON WHICH THE JURY VERDICT WAS BASED IN PART DEPRIVE THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II. DID THE PROSECUTORIAL MISCONDUCT AT TRIAL AND IN ARGUMENTS, AND BY UNWARRANTED PROSECUTORIAL ATTACKS ON DEFENSE COUNSEL, DEPRIVE THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS _ TO THE

UNITED STATES CONSTITUTION?

LIST OF PARTIES

The parties to this proceeding are John E. Britain and the State of Alabama.

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OPINIONS DELIVERED IN COURTS BELOW

The affirmance of Petitioner's conviction by the Court of Criminal Appeals of Alabama is reported as Britain v. State, ___So. 2d ___, (Ala. Cr. App. 1987). The Supreme Court of Alabama denied the petition for a writ of certiorari filed by Petitioner without opinion. The opinion affirming Petitioner's conviction is set forth in its entirety infra in the Appendix.

GROUNDS UPON WHICH SUPREME COURT JURISDICTION IS INVOKED

The statutory provision which confers upon this Court jurisdiction to review the judgment of decree in question by writ of certiorari is 28 U.S.C. §1257(3), which provides that judgments or decrees rendered

by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. All persons born

or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

John E. Britain was indicted and convicted in Baldwin County, Alabama, for two violations of the Alabama Ethics Act, §36-25-5, Code of Alabama, 1975, and of second degree theft of property by deception in violation of §13A-8-3, Code of Alabama, 1975. Britain was sentenced to five years' imprisonment, fined $5000.00 and ordered to pay $25.00 to the Alabama Crime Victims Compensation Fund in each conviction of the Alabama Ethics Act. He was sentenced to ten years' imprisonment, and ordered to pay $1000.00 in restitution to the Alabama State Docks and $25.00 to the Crime Victim's Compensation Fund for the theft of property by deception conviction. (R. 662-664).

Britain's motion for new trial alleged "the verdict was based on outside influences" among other grounds. The motion was denied without an evidentiary hearing and opportunity to present evidence of the outside influences. (R. 655-658, 660).

During trial, the state attorney questioned key prosecution witness, John L. Maples, regarding a conversation he had with Britain's defense attorney prior to trial. This testimony was objected to as immaterial. (R. 61). Maples testified over defense objections that he had contacted Britain's defense attorney, Thomas M. Haas, to discuss his situation regarding the Alabama State Docks investigation. The witness testified Mr. Haas asked "you do know that I am John Britain's attorney." Maples responded he did not and would

need ancther attorney. (R. 97).

Maples also testified he delivered several loads of topsoil and shells to Britain's home and sent the payment invoices for the materials to the Alabama State Docks. (R. 45 - 57).

Britain's defense counsel requested the State turn over any prior statements of witnesses testifying at trial. The State has voluntarily turned over statements of witnesses prior to trial which were contradictory to the witnesses' trial testimony. (R. 169-175, 277-297).

Defense character witness Marion Martin, Sr. was questioned repeatedly as to whether or not he had been drinking. The State's attorney remarked he smelled of alcohol. Objections were sustained. (R. 300-304).

A potential state witness, Henry

Scott, had been seen talking to jurors. This was reported to the Court. Mr. Scott denied conversing with jurors. Defense counsel stated an individual who had left the Courthouse had been seen talking to jurors. (R. 315-316).

During the testimony of defense character witness Jerry Tew, "derogatory tactics" used by the State's attorney were objected to. Objection was overruled (R. 350 351). The witness was asked if he had had defense counsel Thomas Haas "write a letter to the State investigators about this case." Objection was sustained. (R. 353).

Defense attorneys objected to the State's attorney pounding on the jury rail while questioning witnesses. (R. 467).

During closing argument by the State, Assistant Attorney General

Bill Wasden stated the jury did not hear testimony from one of Britain's neighbors who had been referred to in other testimony. Objection was sustained. (R. 490). Wasden argued Britain "had (docks' workers) under his thumb, he practically had them as indentured slaves. Something that is part of our history." Objection that the argument was an improper emotional appeal to the jury, which included five black persons, was overruled. (R. 497-498). Wasden argued Britain "threatened (docks' employees), threatened them with bodily harm." (R. 496). Despite sustained objections during direct questioning, Wasden argued defense witness Marion Martin "walked in here reeking of alcohol, could not remember where he lived

...". The trial court responded to defense objection by stating the jury would form its own impressions and decision. (R. 501-502). Finally, Wasden argued the evidence heard by the jury was "the tip of the iceberg over there at the Docks." Objection was sustained and the jury instructed to disregard.

Final closing argument for the state was given by Assistant Attorney General Don Valeska. Valeska argued he wanted the jury "to see how far those slime bags would go . . .". Objection was sustained. (R. 547-549). He argued ". . . you reckon Adolph Hitler ever had him a farty foot boat . . . you reckon Adolph Hitler and Jerry Tew and those guys, they're the ones that got the power . . . the only

difference between us and Jerry Tew and his Nazis, we get a jury . . .do you reckon Adolph Hitler used a jury." Objection was sustained. (R. 551-554). Valeska further argued defense witness Jerry Tew, an Alabama State Docks' employee, would be "out there building" a boat slip at the State Docks. Objection was overruled. (R. 556). He argued investigations and meetings were conducted in secret because of talk about throwing people in the river. (R. 558). Finally, Valeska argued "you reckon those guys that work out at the State Docks and paying for their yachts . . . sports cars . . . homes at Gulf Shores. . .". Objection was sustained. (R. 558-559).

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR NEW TRIAL WITHOUT AN EVIDENIARY HEARING AND AN OPPORTUNITY TO PRESENT EVIDENCE OF OUTSIDE INFLUENCES UPON WHICH THE JURY VERDICT WAS BASED IN PART DEPRIVED-THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioner's motion for new trial was denied by the trial court without affording Petitioner any opportunity to be heard and present evidence of the grounds for new trial alleged in the motion, including the grounds that the verdict was based on outside influences. (R. 655-658, R. 660, Appendix A-31).

During trial of the Petitioner, it was brought to the trial judge's attention that a potential witness for the state and another unknown individual had been seen talking to jurors. The potential witness, Henry Scott, denied this, stating to the court that he had not spoken with jurors. The other individual had left the courthouse. (R. 315-316). In addition, numerous instances of prosecutorial misconduct occurred before the court including an effort by the state's attorney to present for the jury's consideration irrelevant and highly prejudicial testimony concerning a conversation prior to trial between the state's witness, John Maples, and defense attorney, Thomas M. Haas. (R. 61, R. 96-97).

These and other objectionable matters were made the subject of a motion for new trial, however, the Petitioner was not afforded any opportunity to present evidence of the outside influences upon which the verdict allegedly was based.

Under Alabama law, defendant is entitled to an evidentiary hearing on a motion for new trial where it appears that jurors might have considered extraneous facts which might have improperly influenced their verdict. Allen v. State, 494 So.2d 777 (Ala.Cr.App. 1985). A presumption of prejudice arises when the trial judge learns of such outside influences and his complete failure to hold a hearing has been held to constitute an abuse of discretion and reversible error.

United States v. Chiantese, 582 F.2d 974 (5th Cir. 1978). Off-the-record contact with a juror is presumptively prejudicial and the Government bears the hearing burden of proving such contact did not affect the jury. The failure to meet this burden requires a new trial. United States v. Forrest, 620 F.2d 446 (5th Cir. 1980).

This Honorable Court "has long since held that the remedy for allegations of jury partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). In Smith, upon granting of a writ of certiorari, the United States Court of Appeals for the 2d Circuit was reversed: that court had affirmed

grant of Petitioner's writ of habeas corpus. The United States Supreme Court reasoned in Smith that the Petitioner was not entitled to have his verdict set aside on the ground that he was denied due process of law in violation of the Fourteenth Amendment to the United States Constitution by virtue of juror bias or prosecutorial misconduct because a post-trial hearing has been conducted in which the Petitioner had been afforded the opportunity to prove actual bias and had failed to do so. This was held sufficient to decide allegations of juror partiality.

Due process does not require a new trial in all instances where a juror has been placed in a potentially compromising situation, 455 U.S. at

217, 102 S.Ct. 940, 71 L.Ed.2d 78. The Smith Court concluded a post-trial hearing in both federal and state courts was sufficient under the Due Process Clause of the Fourteenth Amendment to decide allegations of jury misconduct. 455 U.S., at 218, 102 S.Ct. 940, 71 L.Ed.2d 78.

Further, such a hearing would not disrupt the jury process in such circumstances. "The Court's holdings requiring an evidentiary hearing where extrinsic influences or relationships have tainted the deliberations do not detract from, but rather harmonize with the weighty government interest in insulating the jury's deliberative process." Tanner v. United States, 483 U.S. ____, 107 S.Ct. _____, 97 L.Ed.2d 90 (1987).

The trial court was under a duty to conduct an evidentiary hearing on the Petitioner's motion for new trial where allegations of outside influences on the jury were both made in the motion and brought to the court's attention at trial. The failure of the court to conduct such a hearing deprived the Petitioner of his right to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution.

II. THE PROSECUTORIAL MISCONDUCT AT TRIAL AND IN ARGUMENTS, AND BY UNWARRANTED PROSECUTORIAL ATTACKS ON DEFENSE COUNSEL, DEPRIVED THE PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Numerous incidents of prosecutorial misconduct occurred throughout the Petitioner's trial and in closing arguments made by the State of Alabama. During the testimony of prosecution witness John Maples, the State elicited testimony over defense objections regarding a pretrial conversation between defense attorney Thomas Haas and the witness. Maples told the jury about his conversation with the defense attorney and stated

he was not informed of Haas' representation until he had completed his conversation. (R. 61-62, 96-97). This testimony was immaterial and irrelevant and should not have been permitted by the trial court. The trial judge's failure to exclude this improper testimony caused the jury to be distracted from the issues and evidence of the case and prejudiced the Petitioner.

Prior to trial, prior statements of key state's witnesses Roy Cox and James King had been furnished by the state to defense attorneys. The statements of both witnesses given to defense attorneys were directly contradictory to the trial testimony given by the witnesses. At trial, defense attorneys stated they had been

misled by the state providing them with a prior statement of each witness which was the opposite of their testimony at trial. (R. 169-175).

The attorney for the state again referred to defense attorney Thomas Haas in cross-examining defense character witness Jerry Tew by asking if the witness had "Tom Haas write a letter to state investigators about this case." Objection was sustained. (R. 353).

State's attorney Bill Wasden stated during his closing argument that the Petitioner enslaved other docks' workers referring to such slavery as "a part of our history." Five black individuals served on Britain's jury. While the court admonished Wasden to avoid such

comments, objection was overruled and the jury was not instructed. (R. 496). Other misconduct in closing argument by Wasden included referring to a defense witness as "reeking of alcohol, could not remember where he lived" despite sustained objection to this subject during cross examination of the witness. The trial court stated the jury would make its own decision, but did not sustain objection or instruct the jury. Wasden stated the evidence heard by the jury was the "tip of the iceberg" at the docks over sustained objection. The jury was instructed to disregard. (R. 501-506).

Assistant Attorney General Don Valeska in closing referred to Petitioner as a "slime bag," to which objection was sustained, and compared

Petitioner and defense witness Tew repeatedly to Adolph Hitler and Nazis, to which objection was overruled. (R. 552). Valeska stated Britain was a "thug" (R. 551-552) and Tew would be building a boat slip for himself at the docks if the jury acquitted Britain. Objection was overruled. (R. 556). Objections were sustained to Valeska's references to "yachts, sports cars and homes at Gulf Shores" paid for by docks workers and a reference by state's witness Tew attributed to Petitioner about "someone floating in the river." (R. 558-559). Objection to this testimony had been sustained during direct examination of the witness. (R. 157-162).

Thus, prosecutors at Britain's

trial established a pattern of prosecutorial misconduct by eliciting prejudicial and immaterial testimony regarding defense attorney Haas and repeatedly making comments which were not based upon the evidence and were prejudicial to the Petitioner. This pattern of misconduct by prosecutors throughout trial was uncontrolled by the trial judge. "In general, prosecuting attorneys are no longer permitted to indulge themselves, or their audiences, in unrestrained, abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is." United States v. Windom, 510 F.2d 989, at 994, cert. denied, 423 U.S. 863, 96 S.Ct. 121, 46 L.Ed 2d 91 (1975). Such characterizations will

not provoke reversal if supported by the evidence but accompanied an unstemmed flow of prejudicial conduct and comments by prosecuting attorneys.

The prosecuting attorneys' conduct and comments violated the due process clause. The prejudicial references to slavery and the other instances of misconduct were calculated to engender prejudice or had a tendency to do so. The misconduct of the prosecutors was completely unjustified and deprived the Petitioner of a fair and impartial trial. The prosecutorial misconduct was not isolated and, in most instances, went uninstructed by the trial court. Indeed, the misconduct detailed was purposeful and flagrant and required repressive measures by the trial judge. Such measures were

not taken, and even had they been, instructions may not cure such persistent and pronounced misconduct.

This Honorable Court held in 1935 that prosecutors must "refrain from improper methods to produce a wrongful conviction . . ." Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). Prosecutors are permitted to strike hard blows, but not foul ones. Ibid. Whether prosecutorial misconduct constitutes reversible error is decided in the circumstances of each case and this Court has ruled that it is not bound by the conclusions of lower courts, but has the duty to make its own independent examination of the record and to decide for itself facts and constructions upon which federal

constitutional issues rest. Napue v. Illinois, 60 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959).

In Petitioner's case, the prosecutorial misconduct called for "stern rebuke and repressive measures." Berger, at 85, 79 L.Ed. 1314, J.J. S.Ct. 629. Such measures were not taken and as a result, as in Berger, "it is impossible to say that the evil influence upon the jury of these acts of misconduct by such mild judicial action as was taken." Ibid. The argument is witnessed by the fact that the trial judge failed to act at all in many instances of misconduct.

The prosecutorial misconduct at Petitioner's trial was pronounced and persistent. Its probable cumulative effect on the jury was not cured and

cannot be disregarded. The Petitioner was deprived of his right to due process of law by the improper and prejudicial misconduct of the prosecutors throughout trial.

THOMAS M. HAAS

CERTIFICATE OF SERVICE

I, Thomas M. Haas, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served a true and correct copy of this Petition For A Writ of Certiorari on the Honorable Don Siegelman, Attorney General of Alabama, by depositing three (3) copies of same in the United States mail, at the United States Post Office at 250 St. Joseph Street, Mobile, Alabama 36602 at approximately ~~11:00~~ 4:00 P.m. on this 21st day of March, 1988 with sufficient postage affixed thereon to insure first class delivery.

Thomas M. Haas

THOMAS M. HAAS

APPENDIX

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

1 Div. 399

John E. Britain

v.

State

Appeal from Baldwin Circuit Court

BOWEN, PRESIDING JUDGE

John E. Britain was the maintenance supervisor for the Alabama State Docks in Mobile. He was indicted and convicted for two violations of the Alabama Ethics Act, §36-25-5, Code of Alabama 1975. In each case, he was sentenced to five years' imprisonment, fined $5000, and ordered to pay $25 to the Alabama Crime Victims Compensation Fund. He was also convicted of second degree theft of property by deception in violation of §13A-8-3, sentenced to ten years' imprisonment, and ordered to pay $1000 in restitution to the State Docks and $25 to the Crime Victims Compensation Fund. The sentences in the ethics violation cases were ordered to run concurrently with the sentence in the theft case.

I

The defendant's motion for judgment of acquittal was properly denied because the State presented a prima facie case of each crime charged.

The substance of Counts I and III was that the defendant caused invoices for topsoil, dirt, and shells to be submitted to and paid by the State Docks when those materials were actually delivered to the defendant's residence for his personal use. There was testimony that the defendant was the supervisor of the maintenance department at the State Docks and that he had the authority to order and sign for materials in an unlimited dollar amount. John E. Maples, the owner of a hauling company that did business with

the State Docks, testified that in the latter part of 1983 or the early part of 1984 his company delivered "three to five" truckloads of topsoil and "three to five" truckloads of clam shells to the defendant's residence. The price of the dirt was between $150 and $200 per load. The shells were around $300 per load. Maples testified that the defendant did not pay for this material but told him "to just make up some invoices as we normally do with the State Docks and send them down there at various increments dated various different dates and he would sign the tickets accordingly." The different dates were "so that (the invoices) would blend in with the actual materials that were ordered for the State Docks." Maples testified

that "we were requested to make up some bogus invoices and send them to the State Docks for payment." He stated that he was paid by the State Docks for the loads delivered to the defendant's residence.

Maples' testimony was corroborated by that of David Cannon and Bobby Broglen, truck drivers for Maples Hauling Company. Cannon testified that during the latter part of 1982 and in 1983 he delivered three truckloads of topsoil and one load of shells to the defendant's residence. The defendant was present on two of these deliveries. He stated that, on instructions from Mr. Maples, "the next time that we would take a load down (to the State Docks), we would take two or three extra tickets with

us and get them signed. And we kept doing this until we got all the tickets signed to take care of the amount of dirt that was sent to his home." Cannon testified that the defendant signed several tickets.

Broglen testified that in late 1983 he delivered one load of shells to the defendant's home. The defendant was home when the shells were delivered.

Howard McKenzie, the assistant director of the Alabama Ethics Commission, testified that the statements of economic interest filed by the Defendant for 1982 and 1983 did not indicate that the defendant had received any shells or dirt from Maples Hauling.

Although the State did prove that

the defendant did sign a number of invoices showing the delivery of "base clay" by Maples Hauling Company to the State Docks, there was absolutely no proof of which invoices were "bogus" and for the material actually delivered to the defendant's residence. Although there was no documentary proof that the defendant signed any "bogus" invoice, there is considerable circumstantial evidence to support that factual finding.

However, since no count of the indictment specifically charged the defendant with actually signing a false invoice, the State was not required to prove that the defendant actually signed a false invoice as an element of proof that he used his offical position for personal gain or

that he was guilty of theft by deception.

Count II charged that the defendant used his official position as maintenance supervisor to obtain the labor and services of State Docks employees under his supervision for his direct personal financial gain.

Two employees of the State Docks testified that the defendant was their supervisor and that they worked on the defendant's boat or home while they were being paid for working at the State Docks. Roy Cox testified that he worked on the construction of the defendant's shrimp boat and boat slip from 1981 through 1984. James King testified that he worked on the defendant's boat and house during the years from 1981 to 1983. This

testimony presented a prima facie case of the violation of the State Ethics Act charged in Count II of the indictment.

A third state employee, John Hobbs, also testified. However, Hobbs testified that when he worked at the defendant's residence in 1979, 1980, or 1981 he was not paid by the State Docks because he would take vacation time or accumulated leave time. Hobbs' testimony did not establish any violation of the State Ethics Act.

The fact that some of the State's evidence was contradictory and conflicting does not negate the fact that the State did present a prima facie case of each crime charged in the indictment.

"'The effect of contradictory and inconsistent statements goes to the credibility of the witness and is a question for the jury.' Magro v. State, 384 So.2d 871, 874 (Ala.Cr.App.), cert. denied, Ex parte Magro, 384 So.2d 875 (Ala. 1980). '(A) jury may believe part of the evidence of a witness and reject part.' ... 'Inconsistencies and contradictions in the testimony of a witness do not make it inherently improbable.' ... 'The inconsistencies may impair the credibility of the witness and reduce the weight of the testimony, but they do not destroy the probative force of the testimony as a matter of law.' Jones v. State, 469 So.2d 713, 716-17 (Ala.Cr.App. 1985)." Yeager v. State, 500 So.2d 1260, 1263 (Ala.Cr.App. 1986).

II

The trial judge properly charged the jury that, with regard to Count III of the indictment charging theft by deception of "money or checks the property of the Alabama State Docks," they could consider "any acts that occurred subsequent to October 1 of 1979."

The statute of limitations for theft is three years, § 15-3-1, Code of Alabama 1975, unless the prosecution is "for conversion of the state ... revenue," in which case the statute of limitations is six years. §15-3-3.

Violation of the Alabama Ethics Act is a felony, § 36-25-27(a), to which applies the three-year statute of limitations applicable to felonies in general. §15-3-1.

The indictment was returned in October of 1985. This tolled the statute of limitations. §15-3-7. As set out in Issue I, there was sufficient evidence of the defendant's criminal activities in 1982, 1983, and 1984 alone to sustain convictions for all three counts in the indictment.

III

The trial judge properly denied the defendant's request for a mistrial. State's witness Roy Cox, a State Docks employee, testified that, after the investigation into the defendant's criminal activities began, the defendant told him "to do (his) job and keep (his) mouth shut or somebody else could be found floating in the river." The trial judge overruled defense counsel's objection

that "(t)here is no charge of this sort of thing in this case," but directed the prosecutor to "lay a predicate as to time."

When Cox testified that the statement was made "in the latter part of '81," the trial judge "sustain(ed) the objection to the statement about the river because of the time factor" and instructed the jury to disregard that threat.

Defense counsel requested a mistrial which the trial judge denied "because the Court had required the State to lay a predicate and sustained the objection and instructed the Jury to disregard it and I don't feel that it is not capable of being put out of the Jury's mind. And I think they have been sufficiently instructed." There

was no objection to the judge's instructions or request for further instruction.

"A crucial assumption underlying that system (of trial by jury) is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed. Parker v. Randolph, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979). "The 'rule' - indeed, the premise upon which the system of jury trial functions under the American Judicial System - is that juries can be trusted to follow the trial court's instructions." Id., 442

U.S. at 74, 99 S.Ct. at 2140, n. 7. See also Francis v. Franklin, 471 U.S. 307, 325, 105 S.Ct. 1965, 1976, n. 9, 85 L.Ed.2d 344 (1985). "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." Richardson v. Marsh, U.S. ____, 107 S.Ct. 1702, 1709 (1987).

It must be presumed that the jury followed the judge's instructions. Kennedy v. State, 472 So.2d 1092, 1105 (Ala.Cr.App. 1984), affirmed, Ex parte Kennedy, 472 So.2d.1106 (Ala.), cert.

denied, Kennedy v. Alabama, ____ U.S. ___, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985). "There is a prima facie presumption against error where the trial court immediately charges the jury to disregard improper remarks or answers." Wadsworth v. State, 439 So. 2d 790, 793 (Ala.Cr.App. 1983), cert. denied, 466 U.S. 930, 104 S.Ct. 1716, 80 L.Ed.2d 188 (1984).

A motion for a mistrial "is addressed to the sound discretion of the trial court, and its ruling will not be reversed in the absence of a clear showing of abuse of discretion." Ex parte Jefferson, 473 So.2d 1110, 1114 (Ala. 1985), cert. denied, Jefferson v. Alabama, ____ U.S. ____, 107 S.Ct. 328, 93 L.Ed.2d 300 (1986). Although each case must be decided

upon its individual merits, Williams v. State, 245 Ala. 32, 36, 15 So.2d 572 (1943), the general rule is that a motion for a mistrial is properly denied where the trial court instructs the jury to disregard. Lee v. State, 265 Ala. 623, 628, 93 So.2d 757 (1957); Drake v. State, 257 Ala. 205, 207, 57 So.2d 817 (1952); Coats v. State, 253 Ala. 290, 295, 45 So.2d 35 (1950), even where the trial court initially ruled the objectional testimony admissible; Parsons v. State, 251 Ala. 467, 478, 38 So.2d 209 (1948).

IV

On direct examination of the defendant, defense counsel attempted to establish that there had been extensive pretrial publicity

surrounding the prosecution of the defendant. Counsel represented to the trial judge that he was "really showing ... a motivation for the prosecution, ... beyond any possibility of wrongdoing by the Defendant." The alleged motivation for the prosecution was "to get newspaper name publicity for (the Attorney General) and his political campaign (for governor)."

The trial judge properly ruled that the issue of pretrial publicity was "irrelevant to the issues before the court," and refused to allow defense counsel to pursue that "theory of defense."

In some cases, the conduct of the investigating officers and prosecuting officials may constitute admissible

evidence. Blackmon v. State, 246 Ala. 675, 682, 22 So.2d 29 (1945). ("The jury had the right to duly regard the acts of the officials in the line of their duty, and counsel had the right to duly comment on the testimony of such investigating officials in the light of their duty and zeal, or the lack thereof, as exhibited by the evidence, within the rules that obtain."). However, in this case, no prosecuting or investigating officer testified. See Miller v. State, 16 Ala.App. 3, 74 So. 840 (1917), overruled on other grounds, Steward v. State, 18 Ala.App. 92, 89 So. 391, 395 (1921).

"The chief test (of the admissibility of evidence) is relevance and materiality." O'Brien v.

United States, 411 F.2d 522,524 (5th Cir. 1969). Here, evidence of the State's motive for prosecuting the defendant was not relevant to any material issue in the case. See Shuttlesworth v. City of Birmingham, 42 Ala.App. 296, 298, 161 So.2d 796 (1963), cert. denied, 276 Ala. 707, 161 So.2d 799 (1964), reversed on other grounds, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965) (evidence of publicity given to a federal hearing "irrelevant and immaterial" to issues involved in a state prosecution for loitering).

Even if the prosecution did engage in the practice of disseminating pretrial publicity prejudicial to the defendant, that effort, despite its reprehensible

character, had no relation to the trial of the issue of the defendant's guilt or innocence. As defense counsel stated, the motivation for the prosecution went "beyond any possibility of wrongdoing by the Defendant."

The remedy for prejudicial publicity is either a motion to dismiss, a motion for a change of venue, or a request for a mistrial. The cases make it clear that the issue of whether or not publicity either before or during trial has prejudiced jurors and violated a defendant's right to an impartial jury is a mixed question of law and fact for determination by the trial court. Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 849 (1984).

V

The defendant's motion for new trial was properly denied without an evidentiary hearing. Among the twenty grounds for the motion were the following: "that the jury verdict was tainted by pretrial publicity and publicity contemporaneous with the trial," and "that the jury verdict was not based upon evidence or the law but on outside influence." No supporting facts were alleged in the motion and the motion was not verified.

"Assertions of counsel in an unverified motion for new trial are bare allegations and cannot be considered as evidence or proof of the facts alleged." Smith v. State, 364 So.2d 1, 14 (Ala.Cr.App. 1978). "Error may not be predicated upon the

overruling of a motion for new trial where there was no evidence offered in support of the motion." Tucker v. State, 454 So.2d 541, 547-48 (Ala.Cr.App. 1983), reversed on other grounds, Ex parte Tucker, 454 So.2d 552 (Ala. 1984). Additionally, the record contains no objection to the fact that the motion was denied without a hearing.

VI

We find no instance of prosecutorial misconduct alleged by the defendant which constitutes reversible error.

A.

Prior to trial, the defendant filed a general motion for discovery requesting "Brady material." The prosecution voluntarily supplied the

defendant with one written exculpatory statement of Roy Cox and one written exculpatory statement of James King. Under Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this was all the evidence the State was required to produce. United States v. Starusko, 729 F.2d 256, 260 (3rd Cir. 1984) ("Evidence impeaching the testimony of a government witness is exculpatory when the credibility of the witness may be determinative of a criminal defendant's guilt or innocence.").

Apparently, the State did not inform the defendant that both Cox and King had given additional statements which were inculpatory and incriminated the defendant. We find no allegation that the prosecution

actually told the defendant that Cox and King had only given one statement each.

At trial, after each witness had testified, defense counsel complained of the State's failure to produce the additional inculpatory statements and alleged that "we have kind of been led down a garden path here" and "lulled into a false sense of security."

The State then furnished the defendant with the other statements of Cox and King. The trial judge denied the objection "after the Defendant's attorneys have had sufficient time to review the additional statements . . . that were voluntarily furnished by the State." On cross-examination of Cox and King, defense counsel took full advantage of the written conflicting

statements given by both witnesses.

"(T)he general rule (is) that an accused is not entitled to discover statements of government witnesses before trial." Ex parte Pate, 415 So.2d 1140, 1144 (Ala. 1981). With exceptions that are not applicable in this case, Rule 18.1, Alabama Rules of Criminal Procedure (Temporary), provides that the defendant shall not be entitled to inspect statements made by state witnesses. Rule 18.1(c)(1) and (e).

B.

We have carefully examined each specific instance of prosecutorial misconduct alleged by the defendant. In most of the cited instances, the trial court sustained the defendant's objection. In some instances, the

trial court found no impropriety. In other instances, the trial judge cautioned the prosecutor and instructed the jury to disregard the objectionable matter. While this Court cannot approve of the prosecutor's conduct in every instance, we find that it does not constitute reversible error either because of the corrective action taken by the trial judge or because the conduct itself, while subject to criticism, is not so egregious as to warrant the severe and extreme remedy of granting a new trial.

VII

At trial, the defendant objected to the introduction by the State of the "tickets" used by Maples Hauling Company in making deliveries to the

State Docks. The prosecution could not prove which tickets were legitimate and which were "bogus" tickets for material actually received by the Defendant for his personal use. Despite this fact, the tickets were properly admitted into evidence because they tended to demonstrate the manner in which the charged criminal activity occurred. They showed how the State was defrauded, reflected the testimony of the witnesses, and constituted demonstrative evidence explanatory of the offense. Shiflett v. State, 38 Ala.App. 662, 665, 93 So.2d 523, cert. denied, 265 Ala. 652, 93 So.2d 526 (1957). "Models, replicas and duplicates of tangibles that figured in the transaction or occurrence under litigation may be

displayed to aid the factfinder's understanding of oral testimony." W. Schroeder, J. Hoffman, R. Thigpen. Alabama Evidence 11-4(a) (1957).

We have examined the other issues raised by the defendant and find that in each case, either the alleged error was not preserved for review by proper objection or the subject of the objection simply does not constitute error.

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

STATE OF ALABAMA :

vs. :

JOHN E. BRITAIN, :

Defendant. : CC85-419

TO THE HONORABLE CHARLES PARTIN, JUDGE OF SAID COURT:

MOTION FOR NEW TRIAL

Comes now the Defendant and repectfully moves this Honorable Court to grant a New Trial in this cause and in support of said motion avers as follows, separately and severally as to each count of the indictment:

1. The verdict of the jury is not supported by the evidence;

2. The verdict of the jury is

not supported by the great weight of the evidence;

3. It is respectfully submitted that the jury verdict was tainted by pretrial publicity and publicity contemporaneous with the trial;

4. It is respectfully submitted that the jury verdict was not based upon evidence or the law but on outside influence;

5. The verdict of the jury was improperly inspired by tactics and arguments of the prosecution appealing to the emotions of the jurors on economic and racial grounds;

6. This Honorable Court erred on its ruling on the admission of evidence which was properly objected to by the defendant at trial;

7. The verdict of the jury was

tainted by prosection tactics and examination of State's witness, John L. Maples, Sr. by improperly bringing out that Maples had been to consult one of the defendant's attorneys;

8. Over objection, the state was allowed to bring out improper and immaterial matters before the jury which tained their verdict;

9. Each count of the indictment should be dismissed because the statute of limitations had run;

10. The great preponderance of the evidence shows that the statute of limitations had run as to each count;

11. This Honorable Court failed to invoke the statute of limitations as to each count, and invoked the wrong statute as to Count Three;

12. The prosecution engaged in

improper argument to the jury including referring to the witnesses for the State as indentured slaves of the defendant, which was objected to at the proper time by the defense;

13. The whole thrust of the closing argument of the State was an emotional economic appeal to the jury, and was improper and requires a new trial;

14. The Court erred in its charge to the jury which was duly excepted to at the proper time;

15. The Court erred in its failure to give Defendant's Requested Charge No. 14;

16. The Court erred in its failure to give Defendant's Requested Charge No. 15;

17. The Court erred in its

failure to give Defendant's Requested Charge No. 17;

18. The Court erred in its failure to give Defendant's Requested Charge NO. 18;

19. The Court erred in its failure to give Defendant's Requested Charge No. 19;

20. The Court erred in its failure to give Defendant's Requested Charge No. 22;

Respectfully submitted,

s/original signed
THOMAS M. HAAS
Attorney for Defendant

s/original signed
BAYLESS E. BILES
Attorney for Defendant

I hereby certify that I have this day of November, 1986 served a copy of the foregoing on the Hon. Charles Graddick, Attorney, by depositing a copy of same in the United States mail, properly addressed and postage prepaid.

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BAYLESS E. BILES